DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 04-20100469
Sales and Use Tax
Tax Years: 2007 & 2008

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ISSUE

I. Sales to Out-of-State Customers – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-8.1-5-1; 45 IAC 15-11-2; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Commissioner's Directive 25 (July 2004); Sales Tax Information Bulletin 28 (July 2004); Sales Tax Information Bulletin 28S (October 2007); Sales Tax Information Bulletin 28S (December 2009).

Taxpayer protests the assessment of gross retail tax.

STATEMENT OF FACTS

Taxpayer is an Indiana retailer that sold pre-owned automobiles and trucks. Taxpayer often sold automobiles to out-of-state customers. The Department conducted a sales and use tax audit of the 2007 and 2008 tax years. The audit determined that Taxpayer should have collected sales tax on the sale of vehicles to out-of-state customers during the tax years in question, and was charged sales tax as a result. Taxpayer protests the assessment of sales tax. A hearing was held on the matter, and this Letter of Findings results.

I. Sales to Out-of-State Customers – Gross Retail Tax.

DISCUSSION

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-2-1(a) imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

IC § 6-2.5-5-15 (Repealed July 1, 2004) originally exempted sales of vehicles to out-of-state customers. The Department issued Commissioner's Directive 25 (July 2004) and Sales Tax Information Bulletin 28 (July 2004) to address the change in law. Commissioner's Directive 25 stated that the repeal of IC § 6-2.5-5-15 "only affect[ed] situations where the purchaser [took] possession of the vehicle prior to taking the vehicle out-of-state." The Directive stated that:

> [The] repeal does not affect out of state sales by dealers. **For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location**. **(Emphasis added)**

Sales Tax Information Bulletin 28 provided that the dealer was required to collect the tax and provide forms ST-108 to the purchaser to show that the tax had been paid in Indiana. If the purchaser claimed an exemption, form ST-108E was to be completed and signed by the purchaser with a copy retained by the dealer.

Sales Tax Information Bulletin 28 was updated in May of 2007 becoming Sales Tax Information Bulletin 28S (October 2007). The language from the previous bulletin was removed and the following added:

> A vehicle or trailer sold in interstate commerce is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce" the vehicle or trailer must be physically delivered, by the selling dealer, to a delivery point outside Indiana. The delivery may be made by the dealer or the dealer may hire a third party carrier. **Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale.** The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer, and thus the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis added**) See also Sales Tax Information Bulletin 28S (December 2009).

The audit listed sixty-one vehicles that Taxpayer sold to out-of-state residents. Taxpayer objects to the

Department's decision requiring it to pay sales tax on the sale of the vehicles to out-of-state customers. Taxpayer maintains that it had no knowledge of the change in law. Taxpayer also maintains that the out of state purchasers paid the sales tax out of state.

Taxpayer claims that it had no knowledge of the change in law regarding "drive-out" sales and that it never received official notification that the procedures had changed. Taxpayer has presented no legal authority that the Department was required to notify taxpayer individually of the change in law. As not an insubstantial business, taxpayer is under an obligation to understand and comply with Indiana tax requirements. As explained in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

Assuming for the moment that the Department was under a good-faith obligation to alert automobile dealers of the change in law, there is evidence that the Department did just that by contacting automobile trade associations, publishing a notice on the Department's website, communicating with Indiana businesses holding a Registered Retail Merchant's Certificate, and issuing a press release.

According to the Audit, Taxpayer sold thirteen vehicles, collected sales tax, but Taxpayer did not forward the sales tax to Indiana. Taxpayer provided no evidence to counter the audit finding regarding the thirteen vehicles.

The audit also found that forty-eight vehicles were sold to Non-Indiana residents who accepted delivery of vehicles in Indiana. Taxpayer claims two reasons why it did not have to pay Indiana sales tax. One reason is that some of the vehicles were delivered out of state and thus, were not subject to Indiana sales tax. The second reason is that, although some of the vehicles were not delivered out of state, the out-of-state customers paid the sales tax in their respective States.

For the forty-eight vehicles, Taxpayer claims that after each transaction, the out-of-state customers registered and paid the sales tax out of state at out-of-state's sales tax rates. Taxpayer provided conflicting evidence regarding the method of delivery. Taxpayer showed that forty-three out of the forty-eight vehicles had been picked up in Indiana and the sales tax was paid out of state. However, for sixteen out of the forty-three vehicles, Taxpayer also submitted signed affidavits from the out of state purchasers claiming that the vehicles had been delivered out of state and that the purchasers subsequently paid out of state taxes. Taxpayers did not provide any corroborating evidence, such as bills of lading or other invoices that stated the terms of delivery. Thus, Taxpayer did not provide sufficient evidence to show that the vehicles were actually delivered out of state and not subject to Indiana Tax.

Additionally, Taxpayer further argues that it should not be liable for collecting taxes on the vehicles that it sold and did not deliver out of state because all parties paid their taxes out of state and doing so would have resulted in double-taxation. Taxpayer is mistaken. After 2004, when the out-of-state customers come to Indiana and take possession of tangible personal property in Indiana before they return to their home states, the transactions occur and are completed in Indiana and, therefore, are subject to Indiana sales tax. Taxpayer, as a retail merchant, is thus responsible for collecting Indiana sales tax for transactions that occur in Indiana, unless the customers are entitled to an exemption. Whether the customers paid the sales tax in their home states is irrelevant to Taxpayer's protest. Had Taxpayer properly collected the sales tax from these out-of-state purchasers, the purchasers would have been able to apply the Indiana tax paid as a credit against their home states' tax levied on the same vehicles. Therefore, as it pertains to the vehicles that Taxpayer sold to out-of-state residents and which Taxpayer did not deliver the vehicles out of state, Taxpayer's protest that it was not required to collect Indiana sales tax is denied.

FINDING

Taxpayer's protest is denied.

SUMMARY

Taxpayer's challenge to the imposition of tax on the sale of vehicles to out-of-state customers is denied.

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An html version of this document.